UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

IN THE MATTER OF ROSE MARINE, INC., Debtor. W. JAN JANKOWSKI, TRUSTEE IN BANKRUPTCY FOR ROSE MARINE, INC., Plaintiff/Appellee, vs. MARINE CONTRACTING CORPORATION, EARL J. HADEN, JR., AND ROBERT H. THOMPSON, Defendants/Appellants	)	FILED U.S. DIST. COURT SAVANNAH DIV. DEC. 27 1 39 PM '93 No. CV 493-11

ORDER AND MEMORANDUM

Defendants/appellants Marine Contracting Corporation, Earl J. Haden, Jr., and Robert H. Thompson appeal the March 30, 1993, order of the bankruptcy court[1] awarding plaintiff/appellee Rose Marine, Inc., $806,477.00 on various counts. The trustee for Rose Marine, Inc., cross-appeals the bankruptcy court's failure to award attorney's fees and punitive damages against the defendants/appellants in the March 30, 1993, order. The Court has considered the parties' pleadings, the record on appeal, the trial transcript and exhibits. For the reasons described below, the bankruptcy court's March 30, 1993, order will

[1]The Honorable John S. Dalis, United States Bankruptcy Judge for the Southern District of Georgia.

be affirmed in part and reversed in part. The appellants' motion for oral argument will be denied.

BACKGROUND

I. The History of Rose Marine and Marine Contracting

Rose Marine, a maritime construction company incorporated in 1975, was organized when Donald Austin received $50,000 from his sister, Delores Diamond, as a partial return for monies advanced for protracted litigation involving Diamond. Although Rose Marine had a relatively small amount of capital, it could lease substantial construction equipment from Diamond and Diamond Manufacturing Company for reasonable rates. Diamond later transferred to Austin a 40% interest in equipment owned by Diamond and a 40% interest in equipment owned by Diamond Manufacturing.[2] At first, Rose Marine had difficulty obtaining bonding, rendering it virtually unable to win construction jobs. To secure jobs, Diamond Manufacturing (a bonded company) would bid and subcontract jobs to Rose Marine for the amount of the job less the cost of bonding and two percent. While Rose Marine eventually obtained bonding, it lost its bonding capacity in 1979.

In 1979, Earl Haden, the president of Rose Marine and owner of ten percent of its stock, incorporated Marine Contracting along with Robert Thompson and Benjamin Flint, vice-presidents of Rose Marine. Marine Contracting was formed to assist Rose Marine in

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[2]Austin apparently ran Diamond Manufacturing, and Diamond apparently had the right to collect one-third of Rose Marine's stock.

obtaining payments, bonding, licensing, and financing. Thompson served as Marine Contracting's president and Haden served as its vice-president; neither Thompson, Haden nor Flint resigned from his

employment with Rose Marine. In addition to sharing officers with Rose Marine, Marine Contracting utilized Rose Marine's personnel, equipment, and Norfolk, Virginia, office. In sum, Marine Contracting operated mainly as a management company to subcontract jobs to Rose Marine while the latter company was unable to obtain bonding.

Haden resigned as president of Rose Marine in November 1983, ostensibly to avoid personal liability for federal income taxes owed by the company. Austin replaced Haden as Rose Marine's president, but Haden's control of the business did not end until March or April 1984.

II. **The One Percent Agreement**

At trial, Austin testified that prior to Marine Contracting's incorporation, Haden informed him that Marine Contracting would be established to win construction jobs to subcontract to Rose Marine. Austin and Haden orally agreed that Marine Contracting would subcontract to Rose Marine all jobs on which it successfully bid, and would retain only one percent of the gross revenue from each job, plus the cost of its bonding fee, as profit. Rose Marine would meet all expenses, absorb any loss, and make any profits from the balance of the revenue. Haden, Thompson, and

Flint hotly contested the existence of this one percent agreement.

The bankruptcy court's finding that this one percent agreement existed was based largely on the testimony of Clarance Taylor, Rose Marine's auditor during the formation of Marine Contracting. Taylor stated that he was present at meetings between Austin and

Haden where a one percent agreement had been discussed without objection from Haden. Taylor indicated that these discussions occurred in the mid- to late 1980s; Haden left Rose Marine in 1984. Nonetheless, since Taylor was the only truly disinterested witness in the matter, the bankruptcy court credited his testimony.

Subcontracts executed by Haden or Hugh Cheshier on behalf of Rose Marine and by Thompson on behalf of Marine Contracting during the existence of a one percent agreement make no mention of any such agreement and set Rose Marine's compensation at a fixed price. In contrast, when a two percent agreement was reached in 1984[3] subcontracts executed by Austin on behalf of Rose Marine and Marine Contracting contain the following language:

> The sub-contractor [Rose Marine] shall receive as payment, the amount received by the contractor [Marine Contracting], less 2% of the contract, it being the intent that the contractor receive 2% free and clear of any expenses incurred for this sub-contract.

Pl.'s Ex. 17. At least one subcontract containing this two

[3]The parties do not dispute the existence of a two percent agreement.

percent language has a fixed payment price, however. Pl.'s Ex. 17.

III. **The James River Project**

In the fall of 1983, Marine Contracting subcontracted a job to Rose Marine to perform repairs to the James River bridge fender system in Virginia. On September 26, 1983, several tug boats owned by Curtis Bay Towing Company of Virginia collided with equipment

provided by Rose Marine for use on the James River project.[4] Haden made a claim for $87,000.00 on behalf of Marine Contracting. Curtis Bay offered to settle the matter for $51,000.00, which was accepted by Thompson on behalf of Marine Contracting. Marine Contracting never notified Rose Marine of the damage or gave it any settlement proceeds.[5]

IV. **Austin's Loss of Trust in Haden**

Austin stated that he had the "fullest confidence" in Haden's ability to run Rose Marine. Tr. at 225. He stayed away from the operation of the business, preferring to leave it in Haden's care.

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[4]The damaged equipment was not owned by Rose Marine. Austin owned the CAPTAIN DeYOUNG and Rig Three, and Diamond Manufacturing owned Rig Seventeen. Rose Marine would lease this equipment from Austin for $16,500.00 per month, and would maintain and repair the equipment.

[5]After submitting its claim to Curtis Bay, Marine Contracting discovered that the damage was not as extensive as originally believed. It did not correct or alter its claim, and settled the matter for far more than the damage was worth in an attempt to repay or "spank" Curtis Bay for prior acts. See Tr. at 32.

Austin was based in Savannah, Georgia, home of one of Rose Marine's offices, while Haden worked at Rose Marine and Marine Contracting's Norfolk, Virginia, office. His first suspicion that Haden had not dealt with Rose Marine honestly occurred in 1987, when a Rose Marine employee told him that Haden had received a lot of money from the collision with Curtis Bay at the James River project. Austin began contacting parties involved in the collision in October 1987; his findings led him to file this adversary proceeding on June 6, 1988.

V. **Rose Marine's Claims against Marine Contracting, Haden, and Thompson**

The bankruptcy court liberally construed the complaint and found that plaintiff stated the following causes of action against defendants: 1) breach of contract against Haden and Marine Contracting, contending that Marine Contracting withheld from Rose Marine more than one percent of the gross revenue plus the bonding fee for jobs performed between 1979 and 1983, and withheld more than 2% of the gross revenue plus the bonding fee for jobs performed in 1984; 2) conversion against all defendants arising from the settlement with Curtis Bay; and 3) breach of fiduciary duty by a corporate officer against Haden and Thompson.

The bankruptcy court determined that Virginia law applies to the breach of contract and conversion claims. Georgia law governs the applicable statutes of limitations, the applicability of the Statute of Frauds, the breach of fiduciary duty claim, damages,

and the availability of attorney's fees. Since the parties do not contest the bankruptcy court's choice of laws on appeal, the accuracy of these determinations will not be reviewed.

After a bench trial, the bankruptcy court awarded the Trustee $754,977.00 against Haden and Marine Contracting for breach of contract, the same amount against Haden and Thompson for breach of fiduciary duty, and $51,500.00 on the conversion claim against Marine Contracting, Haden and Thompson. The total damages of $806,477.00 were awarded against Marine Contracting, Haden, and Thompson jointly and severally. It declined to award punitive damages or attorney's fees to plaintiff. The parties timely filed the instant appeal and cross-appeal.

DISCUSSION

This Court has jurisdiction of the appeal and cross-appeal in this non-core proceeding pursuant to 28 U.S.C. §158(a). Marine Contracting, Haden, and Thompson raise the following issues on appeal:

> I. Whether Rose Marine met its burden of proving the existence of an oral contract.
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> II. Whether the record supports a finding of fraud required to toll the statute of limitations.
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> III. Whether Rose Marine is entitled to a recovery based upon conversion.
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> IV. Whether there was sufficient evidence to prove that defendants breached their fiduciary duty.
>
> V. Whether Rose Marine provided sufficient evidence to support the award of damages.

Rose Marine raises the following issues on cross-appeal:

I. Whether the bankruptcy court erred in disallowing Rose Marine's claim for punitive damages.

II. Whether the bankruptcy court erred in disallowing Rose Marine's claim for attorney's fees.

The clearly erroneous standard of review applies to the bankruptcy court's factual determinations, while this Court reviews the bankruptcy court's conclusions of law de novo. In Re Sublett, 895 F.2d 1381 (11th Cir. 1990). Each issue will be addressed in turn.

THE APPEAL

I. The Existence of an Oral Contract

The bankruptcy court, after considering Taylor's testimony and circumstantial evidence, held that Austin and Haden orally agreed to a one percent arrangement and that the one percent agreement was sufficiently definite for enforcement. On appeal, appellants contend that Taylor's vague recollection does not support the existence of an oral agreement, that Haden's silence does not manifest his intent to be bound, and evidence of the oral agreement which contradicts the written contracts is inadmissible.

A. Evidence supporting the existence of an oral contract

The bankruptcy court made a factual finding that an oral agreement existed between Haden and Austin. Since this Court functions as an appellate court in reviewing the bankruptcy court's decision, it may only examine the bankruptcy court's factual findings for clear error. In re Joe Morgan, Inc. (Utility Contractors Financial Servs., Inc. v. Amsouth Bank N.A.),

985 F.2d 1554 (11th Cir. 1993). Due regard must be given to the trial court's opportunity to judge the credibility of the witnesses. Fed. R. Civ. P. 52(a). "If the [trial] court's finding of fact are 'plausible in light of the record viewed in its entirety,' the [appellate court] must accept them even if it is 'convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.'" United States v. Fidelity Capital Corp., 920 F.2d 827, 836 (11th Cir. 1991)(citing Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1985)). Appellants' argument must be considered in light of this deferential standard.

Several factors supported the bankruptcy court's finding that a one percent agreement existed. First, Clarance Taylor, "the only truly disinterested witness in this case," testified that he was present at meetings between Haden, Austin, and Cheshier[6] where the participants discussed the fact that Marine Contracting "was set up by three individuals in Virginia to provide bonding for Rose Marine, and that in the early period of time they were to get on percent of the gross amount of the jobs for providing that bonding." Tr. at 154. Second, Austin also testified that a one percent agreement had been reached between Haden and him for the two companies. Third, written subcontracts executed during the one percent agreement did not refute the existence of the one percent agreement. Austin was not a party to these subcontracts until December 1983; until that time, all of the subcontracts

[6]Hugh Cheshier managed Rose Marine's Savannah office.

were executed by Haden or Cheshier on behalf of Rose Marine and by Thompson on behalf of Marine Contracting. Fourth, if the one percent agreement had been reduced to writing, Marine Contracting's payment and performance bonds could not have been obtained since~ the bonding company required Rose Marine and Marine Contracting to operate at arm's length.

Although the bankruptcy court's findings are sufficient to support the existence of a one percent agreement, this Court notes two additional facts. First, the one percent agreement would not be inconsistent with the practice of bonding companies to charge one percent of the job price for issuing bonds. See Tr. at 273. Second, the fact that subcontracts executed during the one percent agreement contain only a fixed price is not necessarily dispositive: At least one subcontract executed during the two percent agreement contains both a two percent agreement and a fixed payment price. See Pl.'s Ex. 17.

Despite the existence of some evidence indicating that a one percent agreement did not exist,[7] the Court cannot say that the

[7]Haden, Thompson, and Flint all testified that no such agreement was in effect between Rose Marine and Marine Contracting, and contrary to Taylor's testimony, Cheshier did not remember discussing this arrangement at a meeting. Taylor's testimony is shaky in another respect. He testified that discussions about the one percent agreement occurred in the mid to late 1980s; since Haden resigned from Rose Marine in November 1983 and gave up active control in the spring of 1984, Taylor's placement of these discussions indicates that they occurred after Haden left Rose Marine.

bankruptcy court committed clear error in determining that Austin and Haden entered into a one percent agreement. The bankruptcy court's factual findings are plausible in light of the record viewed in its entirety.

B. **The effect of Haden's silence**

Appellants next assert that even if Taylor correctly recounted the discussion at the meeting, Haden merely remained silent and did not object to the one percent agreement. They contend that Haden's silence cannot be construed as an assent to the one percent agreement.

Appellants misconstrue the bankruptcy court's holding. That court held that "Mr. Haden's silence manifested his prior assent to the 1% agreement with Mr. Austin." Ord. at 17-18 (emphasis added). Austin testified that after he learned of Haden's plans to establish Marine Contracting and take one percent of the job as his compensation, he spoke with Haden and Haden verified this

information. Tr. at 227. Haden's failure to object to the existence of a one percent agreement at meetings where Taylor was present supports the existence of a one percent agreement. Thus, Haden's failure to object could reasonably be construed las a manifestation of his prior assent, making inapposite a discussion of whether Haden's silence constituted an acceptance.

C. The effect of the written subcontracts on the oral agreement

To refute the existence of the one percent agreement, appellants next rely on written subcontracts executed by Haden~or Cheshier on behalf of Rose Marine and by Thompson on behalf of Marine Contracting. Appellants argue that Virginia's parol evidence rule prohibits admission of prior or contemporaneous oral negotiations to vary, contradict, add to, or explain the terms of a complete, unambiguous, and unconditional written instrument.

The Court has studied the record on appeal -- particularly the pretrial order, both sets of the proposed findings of fact and conclusions of law submitted by appellants to the bankruptcy court, the bankruptcy court's order, and the trial transcript -- and can find no point where the appellants expressly raised the parol evidence rule before the bankruptcy court. Instead, the appellants' arguments focused upon the lack of evidence supporting an oral agreement and defenses based upon the statute of limitations and the Statute of Frauds. An appellate court generally will not review a legal theory not presented to the trial court, unless the issue is a pure question of law and failure to consider it would result in a miscarriage of justice. National

Ass'n for the Advancement of Colored People v. Hunt, 891 F.2d 1555 (11th Cir. 1990).

Failure to consider the application of Virginia's parol evidence rule would not result in a miscarriage of justice in this case. Even if appellants sufficiently raised the parol evidence rule before the bankruptcy court, this Court would still find

against them on the issue. First, the subcontracts executed during the existence of the one percent agreement do not contain an integration clause, making it possible that they are not the complete agreements between the parties. Since the entire agreement was not necessarily reduced to writing, parol evidence could be admissible to show additional terms agreed upon by the parties. Shevel's, Inc. v. Southeastern Assocs., Inc., 320 S.E.2d 339 (Va. 1984). Second, the subcontracts executed during the existence of the two percent agreement refer to both the two percent agreement and a price to be paid to Rose Marine. See Pl.'s Ex. 17. Thus, the existence of a one percent agreement is not necessarily precluded by or contradicted by the reference to only the price paid on the subcontracts executed during the period of the one percent agreement. Finally, exceptions to the application of the parol evidence rule, such as fraud and the collateral contract doctrine, could be present here.

II. **Fraud Tolling the Statute of Limitations**

In Georgia, the statute of limitations for bringing an action on an oral contract is four years. O.C.G.A. §9-3-25. If a defendant is "guilty of a fraud by which the plaintiff has been debarred or deterred from bringing an action," the statute of limitations runs only from the time plaintiff discovers the fraud. O.C.G.A. §9-3-96. Only actual fraud, one that involves moral turpitude, tolls the statute of limitations. Shipman v. Horizon Corp., 267 S.E.2d 244 (Ga. 1980). The existence of a confidential

relationship between the parties lessens, if not negates, the necessity of showing actual fraud. Sutlive v. Hackney, 297 S.E.2d 515 (Ga. Ct. App. 1982)(patient/physician relationship).

The bankruptcy court found that appellee "clearly carried" its burden to prove fraud sufficient to toll the statute of limitations. Specifically, it noted that Haden and Thompson utilized their positions as officers of Rose Marine and Marine Contracting to deceive Austin by allowing Marine Contracting to retain the full general contractor's profits on the job despite using Rose Marine's personnel, expertise, facilities, and equipment. The bankruptcy court also held that Austin's diligence in discovering the fraud was irrelevant until the relationship of trust and confidence between Austin and Haden ended in April 1984. Austin did not have reason to suspect any wrongdoing by Haden until October 1987; he filed suit within four years of that date.

Again, whether Haden and Thompson used their positions as officers of Rose Marine to deceive Austin and whether Austin exercised reasonable diligence in discovering the fraud were questions of fact properly resolved by the bankruptcy court. An examination of the record indicates no clear error in the bankruptcy court's holding, so this Court must affirm.

III. The Conversion Claim

Appellants also contend that the bankruptcy court erred in awarding damages based upon equipment lost or damaged on the James River Bridge Project because Rose Marine did not own any of the

property. Austin owned the CAPTAIN DeYOUNG and Rig Three,~ and Diamond Manufacturing owned Rig Seventeen. Rose Marine leased this equipment from Austin for $16,500.00 per month, and agreed to maintain and repair the equipment.

As the bankruptcy court correctly held, Rose Marine, as the entity legally responsible for the equipment, has a cause of action for conversion. "'Conversion is any wrongful exercise or assumption of authority, personally or by procurement, over another's goods, depriving him of their possession.'" Bader v. Central Fidelity Bank, 427 S.E.2d 184, 186 (Va. 1993)(citing Buckeye Nat'l Bank v. Huff, 75 S.E. 769, 772 (Va. 1912)). In an action for conversion, plaintiff must show a property right in a converted item, entitlement to immediate possession of that item, and defendant's wrongful exercise of authority of the property. 18 Am. Jur. 2d Conversion 2 (1985). A wrongful sale of goods depriving a person who has a part interest therein of his right constitutes a conversion even if the wrongdoer is an owner of another part of the property. Universal C.I.T. Credit Corp. v. Kaplan, 92 S.E.2d 359 (Va. 1956)(conversion where conditional buyer of automobile defaulted on payments and sold automobile in violation of the sales contract). Since Rose Marine was responsible for repairing the equipment in the event of damage, it

was entitled to the proceeds of the $51,500.00 insurance settlement with Curtis Bay. Marine Contracting's conversion of

these proceeds renders it liable to Rose Marine.

O.C.G.A. §9-3-32 establishes a four year statute of limitations for conversion. Appellants claim that this action is time-barred since the conversion occurred in 1983, but this suit not brought until 1988. The bankruptcy court rejected this argument, finding that there was no showing that Austin failed to exercise due diligence. Examination of the record on appeal indicates that this holding was not clearly erroneous.

IV. The Breach of Fiduciary Duty

The bankruptcy court, relying upon O.C.G.A. §14-2-842(a),[8] held that Haden and Thompson breached their duties of good faith as officers of Rose Marine by syphoning its profit for Marine Contracting's benefit and by converting the proceeds of Rose Marine's claim against Curtis Bay. Appellants claim that "[i]t is difficult to understand" how the bankruptcy court reached its holding.

Marine Contracting's failure to abide by the one percent

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[8]That statute provides as follows:

> An officer with discretionary authority shall discharge his duties under that authority:
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> (1) In a manner he believes in good faith to be in the best interests of the corporation; and
>
> (2) With the care an ordinarily prudent person in a like position would exercise under the circumstances. O.C.G.A. §14-2-842(a)

agreement and its failure to return settlement proceeds in the Curtis Bay incident were not actions taken in good faith and in the best interests of Rose Marine. Although Austin's alleged mismanagement of Rose Marine may have dissipated its assets, any actions taken by Austin do not excuse the actions of Haden~and Thompson with regard to the one percent agreement and the conversion. The bankruptcy court decided against appellants on the two actions underlying the breach of fiduciary duty claim, and this Court has upheld those decisions. Accordingly, this Court must uphold the bankruptcy court's finding that Haden and Thompson breached their fiduciary duties to Rose Marine.

V. **Evidence Supporting the Award of Damages**

The bankruptcy court awarded $754,977.00 to reflect damages flowing from Haden and Thompson's breach of fiduciary duty and Haden and Marine Contracting's breach of contract. The bankruptcy court's award reflected the following information:

Year	Gross Revenue	Cost of Goods Sold	Gross Profit
1981	$ 2,592,791	$ 2,477,268	$ 115,523
1982	1,291,540	1,166,761	124,779
1983	5,762,674	5,429,914	332,760
1984	3,551,830	3,301,766	250,064

Although Marine Contracting's corporate tax returns for 1979 and 1980 were not in evidence, Rose Marine presented records of jobs Marine Contracting subcontracted to Rose Marine. These records indicated that Marine Contracting's gross revenue was $613,181.00 in 1979 and $1,282,973.00 in 1980.

Because Marine Contracting bore certain costs in performing

jobs, the bankruptcy court held that Rose Marine was not entitled to receive all of the job proceeds less one or two percent. Instead, Rose Marine was entitled only to receive the difference between Marine Contracting's gross profit and one percent of gross revenue (1979-1983) or two percent of gross revenue (1984).

Appellants claim that the bankruptcy court erroneously calculated damages for three reasons. First, they allege that the use of total gross revenues for each year significantly inflated the damage award. Second, appellants contend that the bankruptcy court inaccurately calculated damages for 1979 and 1980 since actual financial information was not entered into evidence. Finally, appellants argue Rose Marine is not entitled to damages for 1984 based upon the two percent contract since Rose Marine never requested this award in its complaint or presented evidence supporting its claim. On appeal, Rose Marine did not specifically answer appellants' contentions, but stated only that this Court must defer to the bankruptcy court's holding.

A. Use of gross revenues

Appellants claim that the bankruptcy court's use of total gross revenues in calculating damages resulted in an inflated damage award for two reasons.

First, they argue that Marine Contracting's jobs are often carried over from one year to the next. According to appellants, "revenue related to subcontracts between Rose and Marine in 1979 and 1980, but for which work was not actually performed until a subsequent fiscal year, would be included in the gross revenue...

of where revenue was counted twice in order to support a reduction in damages.

Second, appellants contend that Marine Contracting entered into non-marine subcontracts with other subcontractors under which Rose Marine would not have been entitled to recover based upon the one percent agreement. The bankruptcy court recognized Marine Contracting's use of other subcontractors, Ord. at 8, and Haden and Flint testified to this effect, Tr. at 340-341, 464-465. The Court cannot determine the appropriate award of damages in this situation without knowing the exact terms of the one percent agreement.

The bankruptcy court's order does not clearly define the terms of the one percent agreement. The order notes the following information:

> 1) Austin testified that the agreement was for Marine Contracting to subcontract all jobs to Rose Marine, Ord. at 4;
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> 2) Marine Contracting subcontracted work to other subcontractors, Ord. at 8;
>
> 3) Marine Contracting was to retain one percent of the gross revenue from each job plus the bonding fee, and Rose Marine was to receive the balance of the proceeds, Ord. at 17; and
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> 4) Marine Contracting would subcontract jobs to Rose Marine only until Rose Marine could get bonding, Ord. at 19.

After considering this information, the Court cannot determine whether the one percent agreement contemplated that Marine Contracting would subcontract all jobs to Rose Marine or only jobs that Rose Marine had the capability to perform. Without a

definite statement as to the content of the one percent agreement, the Court

cannot determine whether the damages award to Rose Marine included revenue not contemplated by the one percent agreement. Thus, the Court must reverse for the bankruptcy court to establish the terms of the one percent agreement and adjust its damages award if the agreement did not contemplate that Rose Marine would perform~all subcontracting jobs for Marine Contracting.[9]

B. **Damages for 1979 and 1980**

Rose Marine did not request appellants' tax returns for 1979 and 1980. See R. 7, p. 2. To determine damages for these years, the bankruptcy court determined that the average gross profit for 1981 to 1984 was 6.24%. It then reviewed records of jobs subcontracted to Rose Marine, and estimated that gross revenue totalled $613,181.00 for 1979 and $1,282,973.00 for 1980. By multiplying Marine's estimated 1979 and 1980 gross revenues by 6.24~, the average gross profit for 1981-1984, the bankruptcy court determined that the estimated gross profit was $38,262.00 for 1979 and $80,058.00 for 1980. The bankruptcy court applied the same formula as for 1981-1984, and concluded that $32,130.00 was an appropriate damages award for 1979 and that $67,228.00 was an appropriate damages award for 1980. Appellants claim that this calculation was faulty because the average gross profit reflected higher-than-average gross profits for 1982 and that appellee's

[9]The Court carefully reviewed the pleadings and transcript to determine whether appellants raised this issue before the bankruptcy court. They did. See Tr. at 291-292.

choice to forego discovery of Marine Contracting's 1979 and 1980 tax returns renders it unable to rely on this extrapolation.

In a breach of fiduciary duty claim, the trier of fact must be given a reasonable basis upon which to calculate the amount of damage due to the breach. Holland v. Holland Heating & Air Conditioning, Inc., 432 S.E.2d 238 (Ga. Ct. App. 1993)(reversing award of damages where company produced evidence of defendant's failure to honor agreement to sign notes for working capital but did not show that defendant's failure resulted in company's underfunding and subsequent loss). While the mere difficulty in fixing the exact amount of damages does not prevent recovery, the rule against the recovery of vague, speculative, or uncertain damages relates more especially to the uncertainty as to cause, rather than uncertainty as to the measure or extent of the damages. Georgia Ports Auth. v. Servac Int'l, 415 S.E.2d 516, 519 (Ga. Ct. App. 1992)(citations omitted).

In the case at bar, the cause of Rose Marine's damages for 1979 and 1980 is not uncertain: Marine Contracting and Haden breached the one percent agreement with Rose Marine, and Haden and Thompson breached their fiduciary duty to Rose Marine. While the better practice would have been for Rose Marine to request the 1979 and 1980 tax returns in discovery, the bankruptcy court had a reasonable basis upon which to calculate damages despite some uncertainty as to the measure of damages.

C. Failure to request damages under the two percent agreement

Appellants' final argument is that Rose Marine is not entitled to damages based upon the 1984 two percent agreement since Rose Marine neither requested such relief nor presented evidence that it

was entitled to these damages. The Court has carefully studied the trial transcript and the record on appeal -- especially the parties' proposed findings of fact and conclusions of law and the pretrial order -- and has found that appellants did not assert this particular argument before the bankruptcy court. This Court, acting as an appellate court, will not consider an issue raised for the first time on appeal unless it involves a pure question of law or failure to consider it would result in a miscarriage of justice. Booth v. Hume Publishing, Inc., 902 F.2d 925 (llth Cir. 1990); see also In re Pan American World Airways. Inc., Maternity Leave Practices & Flight Attendant Weight Program Litig., 905 F.2d 1457 (11th Cir. 1990) (noting parties should first clearly present claim, argument, theory or defense to trial court to preserve issue for appeal); see e.g., Simanonok v. Commissioner of Internal Revenue, 731 F.2d 743 (llth Cir. 1984)(Court would consider issue affecting jurisdiction for the first time on appeal).

The first exception noted above does not apply since the damages award is a question of fact. See Boston v. Professional Hockey Ass'n, Inc. v. Dallas Cap & Emblem Mfg., Inc., 597 F.2d 71 (5th Cir. 1979) (noting clearly erroneous standard of review).

The second exception is likewise inapplicable. The Court has

examined the exhibits, the evidence presented to the bankruptcy court, and other applicable portions of the record, and has determined that the damages award was not clearly erroneous. Additionally, appellants' argument on appeal does nothing to convince this Court that it should review this damages award.

Appellants rely on the following rule of law: "[R]elief cannot be granted for matter not alleged or prayed for, and...a verdict and judgment which award relief beyond such pleadings and prayer are illegal and subject to be set aside." Barbee v. Barbee, 41 S.E.2d 126, 129 (Ga. 1947). However, they omit the "well-established" exception to this rule that "if proof goes to the jury without objection, which would show a right in the part offering it, the jury may consider it, although there are no allegations in the pleadings setting up the facts thus proved." Simonds v. Simonds, 243 S.E.2d 545, 546 (Ct. App. Ga. 1978) (citing Barbee, 41 S.E.2d at 129). Although Rose Marine did not request damages under the two percent agreement in its complaint, appellants apparently made no objection or mention of this fact before the bankruptcy court. Thus, the bankruptcy court properly awarded damages under this agreement.

THE CROSS-APPEAL

I. The Claim for Punitive Damages

Based upon the bankruptcy court's findings that appellants were liable for fraud, conversion, and breach of fiduciary duty, Rose Marine claims that it is entitled to an award of punitive

damages. This Court agrees with the bankruptcy court's conclusion that Rose Marine is not entitled to punitive damages.

The applicable Georgia law provides as follows:

> In a tort action in which there are aggravating circumstances, in either the act or the intention, the [fact finder] may give additional damages to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff.

O.C.G.A. §51-12-5. The purpose of a damage award under §51-12-5 must be to deter, rather than punish, a defendant. WMH, Inc. v. Thomas, 398 S.E.2d 196 (Ga. 1990).

Punitive damages are generally not available for breach of contract claims. O.C.G.A. 13-6-10. Claims alleging conversion and breach of fiduciary duty by a corporate officer may support an award of punitive damages. Pelletier v. Schultz, 276 S.E. 2d 118 (Ga. Ct. App. 1981). The availability of punitive damages is a matter within the finder of fact's discretion. See O.C.G.A. §51-12-12.

While Rose Marine's claims of conversion and breach of fiduciary duty could support an award of punitive damages upon proper proof, the bankruptcy court determined that the claims did not warrant punitive damages. A review of the record indicates that this finding is not clearly erroneous.

II. **The availability of attorney's fees**

Rose Marine claims that it is entitled to attorney's fees since appellants were stubbornly litigious by fighting allegations of fraud, conversion, and breach of fiduciary duty by a corporate

officer. Rose Marine alleges that this stubborn litigiousness was established by the bankruptcy court's finding in favor of Rose Marine on these claims and by appellants' admissions that they converted money in the Curtis Bay incident without admitting that the money should go to Rose Marine. Appellants' reply brief does not respond to Rose Marine's claim for attorney's fees.

A party cannot recover attorney's fees absent a statutory provision authorizing recovery. Solomon Refrigeration, Inc. v. Osburn, 252 S.E.2d 686 (Ga. Ct. App. 1979). Under Georgia law, a plaintiff may recover the expenses of litigation if the defendant has acted in bad faith in making the contract, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense. O.C.G.A. §13-6-11 (contract claims); see also Trust Co. Bank of Augusta N.A. v. Henderson, 364 S.E.2d 289 (Ga. Ct. App. 1987)(extending section 13-6-11 to tort claims), aff'd, 373 S.E.2d 738 (Ga. 1988). "When bad faith is not an issue and the only asserted basis for a recovery of attorney fees is either stubborn litigiousness or the causing of unnecessary trouble and expense, there is not 'any evidence' to support an award pursuant to O.C.G.A. §13-6-11...if a bona fide controversy...exists between the parties.' Read v. Benedict, 406 S.E.2d 488, 490 (Ga. Ct. App. 1991). The availability of attorney's fees is a question for the fact finder. Ralston v. Etowah Bank, 429 S.E.2d 102 (Ga. Ct. App. 1993).

In the case at bar, the bankruptcy court, which has been ably dealing with this matter and related litigation for a substantial period of time, held that Rose Marine was not entitled to attorney's fees. Since the fact finder is uniquely qualified to make this determination, this Court must defer to the bankruptcy court's ruling.[10]

CONCLUSION

The decision of the bankruptcy court rendered on March 30, 1993, is affirmed in every respect except for a remand to determine the exact terms of the one percent agreement as it relates to damages. Since the issues were clearly presented in the parties' pleadings, oral argument was not necessary. Accordingly,

IT IS HEREBY ORDERED that the March 30, 1993, order rendered by the bankruptcy court be and is reversed for a determination of the exact content of the one percent agreement and any necessary adjustment to the damage- award flowing therefrom!

IT IS FURTHER ORDERED that the March 30, 1993, order rendered by the bankruptcy court be and is affirmed in all other

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[10]The conversion count would be the claim most likely to support an award of attorney's fees. Even with this claim, Rose Marine relied upon the stubborn litigiousness ground for awarding attorney's fees. Had Rose Marine alleged and supported a bad faith ground for such an award, this Court might have been more receptive to an award of attorney's fees on this single claim. See Ross v. Hagler, 433 S.E.2d 124, 127 (Ga. Ct. App. 1993)(noting "[e]very intentional tort invokes a species of bad faith that entitles a person wronged to recover the expenses of litigation including attorney fees.").

respects.

IT IS FURTHER ORDERED that this matter be and is remanded to the bankruptcy court for proceedings not inconsistent with this opinion .

IT IS FURTHER ORDERED that the appellants' motion for oral argument be and is denied.

JOHN F. NANGLE
UNITED STATES DISTRICT JUDGE

Dated: December 27, 1993